

Aliens and the Duty of *Nonrefoulement*: *Haitian Centers Council v. McNary*

The Lowenstein International Human Rights Clinic*

After the September 30, 1991 military coup in Haiti toppled the democratically elected government of Father Jean-Bertrand Aristide, thousands of Haitians took to the high seas, attempting to flee political persecution in their country. The United States government has responded with a series of measures designed to prevent the Haitian refugees from reaching U.S. borders. This Article provides an overview of the Haitian refugee crisis and discusses *Haitian Centers Council v. McNary*, a challenge to the U.S. government's treatment of Haitian refugees. Part I provides background information on the Haitian exodus and the *Haitian Centers Council v. McNary* lawsuit. Part II argues that the Second Circuit in *Haitian Centers Council v. McNary* correctly ruled that aliens held in U.S. custody outside the mainland United States possess Fifth Amendment rights. Part III explains the Executive's duty not to return refugees to a country where they face political persecution. Part IV discusses Congress's plenary power in immigration matters and the courts' authority to review executive actions in this realm.

I. BACKGROUND

A. *The Coup in Haiti and the Refugee Crisis*

In December 1990, Haiti's first free, internationally monitored elections swept Father Jean-Bertrand Aristide into office with sixty-eight percent of the vote. Nine months later, a military coup overthrew

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This Article was written collectively by Professor Harold Hangju Koh of Yale Law School and attorney Michael Ratner of the Center for Constitutional Rights, the Clinic's faculty supervisors, and by Michael S. Barr, Graham A. Boyd, Raymond H. Brescia, Sarah H. Cleveland, Christopher A. Coons, Lisa M. Daugaard, Paul K. Sonn, and Michael J. Wishnie, several of the Clinic's student participants. The Article also reflects the work of the many other Clinic participants and lawyers who have contributed to the *Haitian Centers Council* litigation.

Aristide and forced him into exile. The Haitian army launched a brutal campaign of killings, torture, and arbitrary arrests against those associated with the grassroots organizations that supported the deposed president. The army attacked vote monitors, ballot counters, local activists, priests, and nuns. The Haitian authorities censored the press, violently broke up political rallies, and beat students protesting in the streets.¹

Thousands of Haitians fled this persecution. In desperation, many took to the high seas, heading for the United States or other nearby countries. Under the authority of a 1981 bilateral executive agreement between the United States and Haiti, the United States Coast Guard intercepted Haitian vessels in international waters, took the Haitian passengers aboard, and destroyed their boats.² On board the Coast Guard cutters, officers of the Immigration and Naturalization Service ("INS") interviewed the Haitians to determine whether they had reason to fear persecution in Haiti.³ Few Haitians had an adequate chance to present their claims during the brief and chaotic interviews.⁴ Those

1. See, e.g., LAWYERS' COMMITTEE FOR HUMAN RIGHTS, HAITI, A HUMAN RIGHTS NIGHTMARE (1992); AMNESTY INTERNATIONAL, HUMAN RIGHTS HELD RANSOM (1992); AMNESTY INTERNATIONAL, HAITI: THE HUMAN RIGHTS TRAGEDY—HUMAN RIGHTS VIOLATIONS SINCE THE COUP (1992); AMERICAS WATCH ET AL., RETURN TO THE DARKEST DAYS: HUMAN RIGHTS IN HAITI SINCE THE COUP (1991).

2. Agreement Effectuated by Exchange of Notes, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559 [hereinafter U.S.-Haiti Agreement]. The U.S.-Haiti Agreement provides the sole legal authority for boarding Haitian flag vessels on the high seas. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 522 & Reporters' Note 8 (1986); Convention on the High Seas, April 29, 1958, art. 22, 13 U.S.T. 2313, 450 U.N.T.S. 82; 5 Op. Off. Legal Counsel 242, 243 & n.4 (1981).

3. The U.S.-Haiti Agreement authorized the U.S. to return interdicted Haitians to Haiti but stated that even on the high seas the U.S. was bound by "international obligations mandated in the [U.N.] Protocol Relating to the Status of Refugees" and that the U.S. "does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." Likewise, the executive order instituting the interdiction program directed that "no person who is a refugee will be returned [to his country of persecution] without his consent." Exec. Order No. 12,324, 46 Fed. Reg. 48 (1981), at § 2(c)(3).

For years, the INS used an undefined standard to screen for refugees. However, in response to criticism of its screening procedures, the INS in 1991 developed the standard of "credible fear." See Memo from Gregg Beyer, Director of Asylum, to Leon Jennings, Chief of Asylum Pre-Screening Unit, and Erich Cauller, Director of Miami Asylum Office, Mar. 1, 1991 (on file with *Harvard Human Rights Journal*). The standard of "credible fear" is easier to meet than the "well-founded fear" standard used to adjudicate asylum claims in the U.S. Immigration and Naturalization Act [hereinafter INA] § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1988) (defining the asylum standard as "persecution" or a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"). See also *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (explaining the "well-founded" fear standard).

4. The Haitians were interviewed aboard the Coast Guard cutters immediately after they were interdicted, which was often after they had been on the seas for several days without food or water. Interviews were not conducted in private and often lasted no more than five minutes. The INS interviewers frequently had little or no knowledge of political conditions in Haiti or of the colloquial terms in which the refugees would describe these conditions. See Laurence H. Tribe & Jonathan S. Massey, *Haiti's Refugees: The Administration Adopts Lawless Policy*, MIAMI HERALD, Feb. 9, 1992, at C1.

who passed this arbitrary process were "screened in" and brought to the United States to apply for asylum;⁵ the thousands who failed were "screened out" and returned to Haiti, where they were often fingerprinted, photographed, or arrested by the Haitian authorities.⁶ Many returnees fled into hiding in the countryside.

In November 1991, the Haitian Refugee Center ("HRC"), a Miami-based Haitian advocacy group, filed suit in a federal court in Florida challenging the U.S. government's arbitrary screening procedures.⁷ The district court repeatedly enjoined the government's improper screening and repatriation of Haitians,⁸ but the Eleventh Circuit reversed each injunction in turn.⁹ Meanwhile, the Bush Administration began using the U.S. naval base at Guantánamo Bay, Cuba, as a temporary detention center for screened-in Haitians. On February 24, 1992, the Supreme Court denied HRC's petition for certiorari,¹⁰ leaving the Haitians unprotected against an arbitrary policy that sent thousands back to their persecutors.¹¹

5. INS guidelines directed that screened-ins "shall be paroled into the U.S. for 'humanitarian reasons'" so as to comply with the U.N. Protocol. INS Role in and Guidelines for Interdiction at Sea (Oct. 6, 1981) (on file with *Harvard Human Rights Journal*). During the 11 years of the interdiction program prior to the Sept. 30, 1991 coup in Haiti, an estimated 24,600 Haitians were interdicted, but only 28 passed the initial asylum screening and were allowed to come to the U.S. to apply formally for asylum. GAO, *Refugees: U.S. Processing Haitian Asylum Seekers*, GAO/T-NSIAD-92-25, at 1 (Apr. 1992).

6. See, e.g., *Haitian Police Detain 150 Returned by U.S.*, WASH. POST, Aug. 15, 1992, at A16.

7. HRC argued against the U.S. government's practice of screening Haitians on three grounds: (1) that it was arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedure Act [hereinafter APA], 5 U.S.C. § 551 (1988); (2) that it violated HRC's First Amendment right to counsel the Haitians; and (3) that the Haitians' rights not to be forcibly returned to Haiti under art. 33 of the U.N. Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter the Protocol]. HRC had been battling U.S. policy towards Haitian refugees for more than a decade. See, e.g., *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *aff'd on other grounds*, 472 U.S. 846 (1985) (INS has statutory duty to make individualized, nondiscriminatory parole determinations); *HRC v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987) (rejecting challenge to interdiction policy); *HRC v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom. HRC v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982) (right of aliens to seek political asylum is sufficient liberty or property interest to invoke due process).

8. *HRC v. Baker*, 789 F.Supp. 1552 (S.D. Fla. 1991); *HRC v. Baker*, 789 F.Supp. 1579 (S.D. Fla. 1991); *HRC v. Baker*, 1991 WL 330943 (S.D. Fla. Dec. 23, 1991).

9. *HRC v. Baker*, 949 F.2d 1109 (11th Cir. 1992); *HRC v. Baker*, 953 F.2d 1498 (11th Cir. 1992); *HRC v. Baker*, 950 F.2d 685 (11th Cir. 1991).

10. *HRC v. Baker*, 112 S. Ct. 1245 (1992) (Blackmun, J., dissenting).

11. In response to *HRC v. Baker*, the U.S. government improved its interview procedures. The interviews were more lengthy, and were conducted on Guantánamo by trained asylum officers. Screen-in rates improved dramatically. After the Supreme Court denied certiorari in *HRC v. Baker*, however, the screen-in rate dropped. It fluctuated wildly during the pendency of *Haitian Centers Council v. McNary*, the case discussed later in this Article, ranging from more than 50% to as low as 2%. The average screen-in rate from the September 1991 coup to June 1992 was approximately 28%. A total of 10,319 people were screened in during this time.

B. Screening and Internment on Guantánamo: Haitian Centers Council v. McNary-I

In opposing certiorari in *HRC v. Baker*, the Solicitor General had assured the Supreme Court that all screened-ins would be brought to the United States for full adjudication of their asylum claims.¹² Nevertheless, five days after the Supreme Court denied certiorari in *HRC v. Baker*, the INS began re-interviewing many screened-in Haitians on Guantánamo. The INS subjected Haitians whom it believed to be HIV-positive to second interviews.¹³ These interviews were identical to those that the Haitians would have received had they been brought to the United States and allowed to apply for asylum,¹⁴ except that the INS refused to allow these Haitians access to counsel.¹⁵ The government consistently blocked the efforts of lawyers and U.S. Haitian advocacy groups to contact and counsel the Haitians on Guantánamo.

In March 1992, a team of law students and lawyers brought a challenge to INS policies on Guantánamo, thus beginning *Haitian Centers Council v. McNary* ("HCC-I").¹⁶ The government responded

NATIONAL ASYLUM STUDY PROJECT, AN INTERIM ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 42 (1992) (quoting INS statistics).

12. Solicitor General's Response to Petition for Certiorari, at 3, in *HRC v. Baker*, 953 F.2d 1498 (11th Cir. 1991), cert. denied, 112 S.Ct. 1245 (1992), quoted in, *HCC-I*, 547 F. Supp. 541 (E.D.N.Y. 1992), at 546.

13. The government tested all screened-in Haitians for the HIV virus. The INA requires that aliens be denied entry into the U.S. if they have a "communicable disease of public health significance." 8 U.S.C. § 1182(a)(1)(A)(i) (1992). The Department of Health and Human Services has designated HIV-positive status as such a disease. 42 C.F.R. 34.2(b)(4) (1992). These regulations empower the Attorney General to waive this ground for exclusion, 42 C.F.R. § 1182(g)(1) (1992), but at this writing, the Attorney General has maintained the exclusionary criterion for the interdicted Haitians. During his campaign, President Clinton promised to lift the HIV entry ban, see, David G. Savage, *Policy Switch Easy as Stroke of Clinton Pen*, L.A. TIMES, Nov. 7, 1992, at A1, but has since gone back on this pledge.

Although the HIV ban is neutral on its face, it has been applied discriminatorily; the interdicted Haitians are the only group that has been tested for the HIV virus. Affidavit of Carolyn P. Blum (Mar. 1992) (on file with *Harvard Human Rights Journal*).

14. See *supra* note 3 for the definition of the asylum standard.

15. Applicants for asylum in the U.S. are entitled to access to counsel. 8 U.S.C. § 1362 (1988).

16. *Haitian Centers Council v. McNary* was litigated in two stages because of a change in U.S. policy towards interdicted Haitians while the case was on appeal. The term "HCC-I" denotes the first stage of the litigation.

The suit was brought on behalf of Haitian service organizations, a legal organization specializing in asylum representation, relatives of the Haitians, and the Haitians themselves. The plaintiffs challenged the U.S. government's policy on seven grounds: (1) the government's refusal to allow Haitian advocates to communicate with their clients being held at Guantánamo Bay constitutes viewpoint-based restrictions on the First Amendment rights of the U.S. organizations; (2) the government's denial of Fifth Amendment due process rights, such as access to counsel, to aliens being held in U.S. custody in territory subject to exclusive U.S. jurisdiction and control is unconstitutional; (3) the government's policy of denying access to counsel to aliens determined to have credible asylum claims and who are forcibly held in custody under exclusive

with motions for Rule 11 sanctions and a \$10 million bond.¹⁷ After two oral arguments, Judge Sterling Johnson, Jr., of the U.S. District Court for the Eastern District of New York, issued a temporary restraining order¹⁸ and, ten days later, a preliminary injunction granting attorneys immediate access to the Haitians detained on Guantánamo¹⁹ and barring the Coast Guard from repatriating those HIV-positive Haitians who had failed their second interviews.²⁰

The government's requests for a stay of the court's order were denied four successive times—twice by the district court and twice by the U.S. Court of Appeals for the Second Circuit. On April 22, however, the Supreme Court stayed the district court's order by a five-to-four vote, pending a decision on the merits by the Second Circuit.²¹ On June 10, 1992, the Second Circuit upheld most of the district court's injunction, thus dissolving the Supreme Court stay.²²

The Second Circuit's decision, however, did not result in the Haitians at Guantánamo gaining access to counsel. After the Supreme Court stayed the district court's injunction, the government immediately subjected all the HIV-positive Haitians on Guantánamo to second interviews without counsel. Those who failed, as well as eighty-nine "refuseniks" who refused to undergo second interviews without counsel, were repatriated. On May 24, 1992, the United States, in a policy reversal, began returning all interdicted Haitians to Haiti without screening their asylum claims, and thus ceased bringing Haitians to Guantánamo.²³ By the time the Second Circuit dissolved the Supreme Court stay, most of the HIV-positive Haitians remaining on

U.S. jurisdiction violates the aliens' statutory rights to communicate with retained counsel; (4) the government's policy discriminates against Haitians on the basis of race and national origin in asylum, an area in which Congress has plenary power and has dictated that determinations be made without reference to such factors—the government's policy thus denies Haitians the equal protection of the laws; (5) the government has a mandatory duty under domestic and international law not to return refugees to a country where they face political persecution; (6) the government's conduct is arbitrary and capricious, an abuse of discretion, and not in accordance with law; (7) the government's failure to publish these policy changes in the Federal Register and to allow for notice and comment violates the rulemaking procedures of the APA.

17. See Marcia Chambers, NAT'L L.J., May 4, 1992, at 15.

18. HCC-I, 789 F. Supp. 541 (E.D.N.Y. 1992).

19. HCC-I, 1992 WL 155853 (E.D.N.Y. 1992) (Johnson, J.).

20. Judge Johnson thus found that the plaintiffs were likely to succeed at a trial on the merits of their First and Fifth Amendment claims. He also considered the plaintiff's third challenge—that aliens whom the U.S. has determined to have credible asylum claims and who are forcibly held in custody under exclusive U.S. jurisdiction have statutory rights to communicate with retained counsel—but rejected it. Judge Johnson reserved judgment on the plaintiffs' other challenges, deferring them for a trial on the merits.

21. HCC-I, 112 S. Ct. 1714 (1992) (Blackmun, Stevens, O'Connor, and Souter, JJ., dissenting). See Anthony Lewis, *Mockery of Justice*, N.Y. TIMES, May 21, 1992, at A29.

22. HCC-I, 969 F.2d 1326 (2d Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3287 (U.S. Sept. 22, 1992) (No. 92-528).

23. See discussion *infra* part I.C.

Guantánamo had already been subjected to second interviews without counsel. Moreover, the Second Circuit vacated that portion of the district court's injunction which granted counsel immediate access to all Haitians held on Guantánamo. The Second Circuit's injunction specified that only screened-ins who were subjected to further interviewing were entitled to access to counsel. Because most of the Haitians left on Guantánamo had already had their second interviews when the Second Circuit rendered its decision, they were prohibited from speaking with counsel. The few who had not yet been interviewed for a second time were also denied access to counsel because the U.S. government chose to cease processing them rather than hold interviews where access to counsel would have been required. At this writing, over 250 Haitians continue to languish in barbed-wire camps on Guantánamo under appalling conditions.²⁴ Most have been interned there for over a year; suicide attempts and hunger strikes marked the first anniversary of their captivity.²⁵

C. Bush's "Floating Berlin Wall": Haitian Centers Council v. McNary-II

While *HCC-I* was under submission, President Bush issued an unprecedented executive order on May 24, 1992, from his vacation home in Kennebunkport, Maine ("Kennebunkport Order") which eliminated the screening process altogether.²⁶ The U.S. Coast Guard began summarily repatriating all intercepted Haitians, in effect encircling Haiti with a "floating Berlin Wall."²⁷

Initiating a second stage in the *Haitian Centers Council v. McNary* litigation ("*HCC-II*"), the *HCC* plaintiffs, on May 28, 1992, sought another temporary restraining order before Judge Johnson of the Eastern District of New York. Plaintiffs challenged the Kennebunkport Order on the grounds that § 243(h) of the Immigration and Naturalization Act ("*INA*")²⁸ and article 33 of the United Nations Convention

24. Refugees have reported numerous instances of beatings, sexual harassment, and rape at the hands of the U.S. military. In addition, peaceful protests by the Haitians in July and August 1992 were met by overwhelming military force. See, Lynne Duke, *U.S. Camp for Haitians Described as Prison-Like*, WASH. POST, Sept. 19, 1992, at A1; Affirmation of "M.P." (slapped for refusing blood test); First Declaration of Father Jacques Fabre (military police officer kicked Haitian in head); Second Declaration of Father Jacques Fabre (mistreatment of detained Haitians) (on file with *Harvard Human Rights Journal*).

25. Lynne Duke, *Haitians Hope Strike Will Open Safe Haven*, WASH. POST, Feb. 11, 1993, at A4; Philip J. Hiltz, *U.S. Denies Appeal for 4 Ill Haitians*, N.Y. TIMES, Dec. 13, 1992, at A9.

26. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

27. See, e.g., Stuart Taylor, *Haitians Face Inhumanity of Bush's 'Floating Berlin Wall'*, AM. LAW., Aug. 10, 1992, at 26.

28. 8 U.S.C. § 1253(h)(1) (1988).

Relating to the Status of Refugees (the "Convention")²⁹ mandate that executive officials shall not return refugees to a country where they may face persecution. Judge Johnson denied the plaintiffs' request, reasoning that § 243(h) applies only to aliens within the United States, and incorrectly believing that he was bound by outdated Second Circuit precedent to find that article 33 is not self-executing.³⁰ In so doing, however, Judge Johnson declared:

It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The Government's conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle of non-refoulement. As it stands now, Article 33 is a cruel hoax and not worth the paper it is printed on³¹

On July 29, 1992, the Second Circuit reversed and ordered the district court to issue the injunction prohibiting implementation of the Kennebunkport Order.³² Again, the government sought a stay, which was granted three days later by a seven-to-two vote of the Supreme Court.³³ Two months later, the Supreme Court granted certiorari.³⁴

During the fall of 1992, Haitians' hopes were raised by President-elect Clinton's statements condemning human rights abuses in Haiti, expressing his support for President Aristide, and declaring his intent to change Bush's interdiction policy and allow Haitians to present their asylum claims.³⁵ Once in office, Clinton did increase efforts to restore President Aristide and, following the lead of the United Nations, sought to place human rights monitors throughout Haiti. However, at this writing, Clinton has stated that he will continue indefinitely Bush's policy of interdiction and return, in effect blocking countless Haitians from fleeing their persecutors.

29. July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137. In 1968, the U.S. acceded to the U.N. Protocol Relating to the Status of Refugees, *supra* note 7, which incorporated the Convention into U.S. law.

30. Judge Johnson relied on *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982).

31. HCC-II, No. 92 Civ. 1258, 1992 U.S. Dist. LEXIS 8452, at 5 (E.D.N.Y. June 5, 1992).

32. HCC-II, 969 F.2d 1350 (2d Cir. 1992), *cert. granted*, 61 U.S.L.W. 3215 (U.S., Oct. 6, 1992) (No. 92-344).

33. HCC-II, 113 S. Ct. 3 (1992) (Blackmun and Stevens, JJ., dissenting).

34. HCC-II, 61 U.S.L.W. 3215 (Oct. 6, 1992).

35. See, e.g., Al Kamen, *Haitian Exodus Could Pose Early Clinton Test*, WASH. POST, Nov. 12, 1992, at A1.

II. DUE PROCESS RIGHTS OF ASYLUM SEEKERS IN U.S. CUSTODY: *HCC-I*

In *HCC-I* the Second Circuit found that the Due Process Clause of the Fifth Amendment entitles screened-in Haitians held at Guantánamo to access to counsel when they are subjected to second interviews. In addressing the Haitian plaintiffs' due process challenge, the Second Circuit narrowly defined the issue before it as:

whether aliens interdicted on the high seas by the United States Coast Guard, who have been found by the government's representatives to have a "credible" fear of persecution . . . and are then forcibly detained by United States government authorities on property that is under the exclusive control of the United States government, may avail themselves of the due process clause of the fifth amendment.³⁶

By limiting its analysis to this circumscribed factual context, the Second Circuit avoided asking the broad and more controversial question whether all aliens subject to official U.S. action abroad necessarily enjoy Fifth Amendment protections. The court's narrow holding explicitly relied upon an approach first articulated in Justice Harlan's concurring opinion in *Reid v. Covert*,³⁷ and more recently reiterated in Justice Kennedy's concurring opinion in *United States v. Verdugo-Urquidez*,³⁸ which asks "what process is 'due' a defendant in the particular circumstances of a particular case."³⁹ The *HCC-I* court found the situation of screened-in Haitian refugees held in detention at Guantánamo to be closely analogous to noncitizens who live in parts of the world subject to exclusive U.S. sovereign control and to aliens in INS detention in the United States—two groups who traditionally have enjoyed Fifth Amendment protections. Upon determining that the screened-in Haitians are protected by the Fifth Amendment, the Second Circuit concluded that the requirements of due process entitled the refugees to access to counsel.⁴⁰

36. *HCC-I*, 969 F.2d 1326, at 1339–40.

37. 354 U.S. 1 (1957) (plurality opinion).

38. 494 U.S. 259 (1990).

39. 494 U.S. at 278 (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 75). The Second Circuit rejected the government's rigid view that aliens outside the U.S. must either enjoy full due process rights in all circumstances or none at all.

40. *HCC-I* at 1345–46. The court noted that U.S. immigration law provides the right to counsel for excludable aliens. Analogizing screened-in Haitians to asylum applicants (some of whom are excludable aliens), the court concluded that plaintiffs "should also have the advice of counsel." *Id.* The court's somewhat conclusory analysis of what process was due plaintiffs may be explained by the facts that the government argued only that plaintiffs enjoyed no due process protections, and that plaintiffs framed their case primarily as a right-to-counsel challenge. The court's finding is well supported, however, by the Supreme Court holding that an applicant for

The Second Circuit's understanding of two Supreme Court decisions, the case of *Reid v. Covert* and *United States v. Verdugo-Urquidez*⁴¹, provided the framework for the court's due process analysis. In its plurality decision in the seminal case of *Reid v. Covert*, the Supreme Court found that two military wives accused of murdering their husbands abroad were protected by the Fifth Amendment, the Sixth Amendment, and Article III.⁴² Although four Justices held that the Bill of Rights applies abroad because the United States "can only act in accordance with all the limitations imposed by the Constitution,"⁴³ Justice Harlan resolved the case on narrower grounds. Declining to find that the Constitution, or even the Fifth and Sixth Amendments, *always* constrained U.S. action abroad, Harlan assessed the "particular circumstances of [the] particular case."⁴⁴ His analysis led him to grant the military spouses Fifth and Sixth Amendment protections because of the importance of these rights in light of the seriousness of their alleged crime⁴⁵ and because it would be neither "impracticable" nor "anomalous" to do so.⁴⁶ Harlan found support for his approach in the *Insular Cases*, a turn-of-the-century line of decisions which he characterized as holding that "the particular local setting, the practical

government benefits is entitled to counsel when, *inter alia*, there exists a likelihood of error without counsel and having counsel would likely reduce that error. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

41. Our analysis of these cases draws significantly on the *amicus curiae* brief of the International Human Rights Law Group, authored by Columbia Law Professor Gerald L. Neuman, which was submitted to the Second Circuit in *HCC-I*. See also Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

42. 354 U.S. 1 (1957). See also *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (extending *Reid's* holding to noncapital cases and to civilian employees of the armed forces); *Grisham v. Hagan*, 361 U.S. 278 (1960) (same); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (same).

Following *Reid*, the Supreme Court and numerous lower courts have recognized that the Constitution applies to citizens and noncitizens abroad who encounter official U.S. action. *E.g.*, *Asahi Metal Industries Co. v. Superior Court*, 480 U.S. 102 (1987) (Constitution protects aliens abroad sued as civil defendants in U.S. courts entitled to due process); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*, 456 U.S. 694 (1982) (same); *United States v. Pinto-Mejia*, 720 F.2d 248, 262 (2d Cir. 1983) (Fourth Amendment applies to Coast Guard's stopping and boarding of aliens' ship on high seas); *United States v. Streifel*, 665 F.2d 414 (2d Cir. 1981) (Fourth Amendment applies on high seas); *United States v. Cadena*, 585 F.2d 1252, 1262 (5th Cir. 1978) (same); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (aliens abroad abducted by U.S. officials protected by Constitution); *United States v. Mundt*, 508 F.2d 904 (10th Cir. 1974) (Miranda rules apply to questioning by U.S. officials in foreign countries); *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968) (Fourth Amendment applies to search by U.S. officials abroad); *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) (Fifth Amendment applies in context of trial of friendly alien, accused of nonmilitary offense, in Berlin).

43. 354 U.S. at 6.

44. *Id.* at 75 (Harlan, J., concurring).

45. *Id.* at 77-78.

46. *Id.* at 74-76.

necessities, and the possible alternatives are relevant to a question of judgment."⁴⁷

Three decades after the *Reid* decision, Justice Kennedy adopted Harlan's approach in his concurrence in *United States v. Verdugo-Urquidez*, a case in which the Supreme Court held that U.S. drug agents had not violated the Fourth Amendment when they conducted a warrantless search of the overseas home of a Mexican national suspected of narcotics trafficking. Chief Justice Rehnquist, writing for five Justices, analyzed the text of the Fourth Amendment to find that the phrase "the people" included only citizens of the United States, thereby denying protection to the noncitizen plaintiff.⁴⁸ Justice Stevens, concurring in the judgment only, insisted that although the noncitizen plaintiff did have rights under the Fourth Amendment, the search was nonetheless reasonable.⁴⁹ Justice Kennedy provided a fifth vote for Chief Justice Rehnquist's opinion but prefaced his separate concurrence with an unusual qualification: "[a]lthough some explanation of my views is appropriate given the difficulties of the case, I do not believe they depart in fundamental respects from the opinion of the Court, which I join."⁵⁰ Thus, although Justice Rehnquist's opinion is technically a majority opinion, Kennedy's qualification, which sets forth his specific rationale for joining the majority, deserves special attention when interpreting *Verdugo* as precedent.

Justice Kennedy's concurrence in *Verdugo* calls for a fact-specific, contextual determination of the scope of the Constitution's extraterritorial application. Kennedy, in the tradition of Justice Harlan and the *Insular Cases*, inquired whether granting Fourth Amendment protections to the Mexican suspect would be either "impracticable" or "anomalous."⁵¹ According to Kennedy, the "absence of local judges or magistrates available to issue warrants, the differing . . . conceptions of reasonableness and privacy . . . and the need to cooperate with foreign officials all indicate" that the Fourth Amendment should not apply.⁵²

In *HCC-I*, the Second Circuit's contextual approach to defining the extraterritorial reach of the Fifth Amendment echoes the analyses of

47. *Id.* (citing *Balzac v. Puerto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138, 142 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901)).

48. 494 U.S. at 264–66. "The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. art. IV (emphasis supplied).

49. *Id.* at 279 (Stevens, J., concurring).

50. *Id.* at 275 (Kennedy, J., concurring).

51. *Id.* at 277–78 (Kennedy, J., concurring) (citing *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).

52. *Id.* at 278.

Justice Harlan's concurrence in *Reid* and Justice Kennedy's concurrence in *Verdugo*. The Second Circuit applied Justice Kennedy's contextual analysis to assess the particular situation of screened-in Haitians at Guantánamo, asking whether application of the Fifth Amendment to them would be either "impracticable" or "anomalous."⁵³

In examining "the particular circumstances" of screened-in Haitians at Guantánamo, the *HCC-I* court focused first on the plaintiffs' territorial link to the United States—the fact that the United States exercises complete jurisdiction and control over Guantánamo.⁵⁴ The court compared the extent of U.S. control at Guantánamo to that maintained in the U.S.-controlled sector of Berlin after World War II, where a U.S. court held that citizens and noncitizens alike were entitled to constitutional protections.⁵⁵ The Second Circuit's emphasis on the importance of the exclusivity of U.S. territorial control finds further support in several other decisions not cited by the court. For instance, in deciding whether the Constitution applies to disputes in the Panama Canal Zone, the Fifth Circuit held that the nature of the territory, as opposed to the status of the individual, is the factor that triggers constitutional protections for both citizens and noncitizens.⁵⁶ Similarly, the D.C. Circuit found that residents of the trust territory of the Pacific Islands enjoy fundamental constitutional rights,⁵⁷ and the United States Court of Claims ruled that the Takings Clause protects noncitizen Marshall Islanders.⁵⁸ Finally, at least one federal court has held that Cuban nationals living on Guantánamo are protected from the Fifth Amendment's Taking Clause.⁵⁹

The Second Circuit found evidence of U.S. control over Guantánamo in the United States' assertion of criminal jurisdiction over aliens⁶⁰

53. *HCC-I*, 969 F.2d at 1343 (citing *Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring)).

54. *HCC-I* at 1342. This characterization of Guantánamo derives from the Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, art. 3, T.S. No.L20418. Indeed, the extent of U.S. control over the base, which covers 45 square miles on two sides of a large bay, is apparent from its appearance—the base looks more like a sleepy Florida suburb than America's first line of defense. Bars, restaurants, schools, a McDonald's, and a Baskin-Robbins serve thousands of military personnel, civilian dependents, and contract workers from Jamaica and the Philippines. Wayne S. Smith, *The Base from the U.S. Perspective* in *SUBJECT TO SOLUTION: PROBLEMS IN CUBAN-U.S. RELATIONS* 98 (Wayne S. Smith & Esteban Morales Dominguez eds., 1988).

55. *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) (granting Fifth and Sixth Amendment protections), *quoted in HCC-I* at 1343. Like Justice Kennedy's concurrence in *Verdugo* and Justice Harlan's concurrence in *Reid*, *Tiede* relied on the *Insular Cases*.

56. *Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974). *See also* *Examining Board of Engineers, Architects, and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (aliens have rights to equal protection in unincorporated territories).

57. *Ralpho v. Bell*, 569 F.2d 607, 618–19 (D.C. Cir. 1977).

58. *Limojwa Nitol v. United States*, 7 Cl. Ct. 405 (1985).

59. *Huerta v. United States*, 548 F.2d 343 (Ct. Cl. 1977).

60. *HCC-I* at 1342 (citing *United States v. Lee*, 906 F.2d 117, 117 & n.1 (4th Cir. 1990)).

and nonaliens⁶¹ at the base. "There is no principled basis," the court determined, "for concluding that the 'screened-in' plaintiffs detained at the base would have fewer substantive rights than those arrested and accused aliens at Guantánamo."⁶² Furthermore, the court reasoned, the extent of U.S. control and "the apparent familiarity of the governmental personnel at the base with the guarantees of due process" rendered the granting of such protections not "impracticable."⁶³

The Second Circuit also based its decision that screened-in Haitians have due process protections on the finding that screened-in Haitians at Guantánamo possess a liberty interest inherent in their special status of having been screened in. Although the court rejected plaintiffs' contention that the mere interdiction and transportation to Guantánamo conferred a liberty interest on the Haitians,⁶⁴ it found that the INS determination that the Haitian plaintiffs had passed a threshold screening altered their "fundamental legal and human rights status . . . vis-à-vis the United States government" and "implicate[d]" article 33 of the Protocol, the INA, the 1981 U.S.-Haiti Agreement, and the executive order implementing the interdiction policy.⁶⁵

The court equated screened-in Haitians with excludable aliens applying for asylum in the United States, a group which enjoys a protected liberty interest in avoiding summary repatriation.⁶⁶ Noting that the second interviews were "identical in form and substance to interviews conducted in the United States," the court reasoned that the screened-in Haitians should enjoy access to counsel to the same extent as do asylum seekers on U.S. soil.⁶⁷ Furthermore, the Second Circuit found that the act of screening in an alien creates a due process-protected "reasonable expectation" that the prospective refugee will be safe from unlawful return.⁶⁸ The court cited as authority for this conclusion *United States ex rel. Paktorovics v. Murff*,⁶⁹ a case in which the Second Circuit found that a Hungarian immigrant who had come to the United States in reliance on certain public statements made by

61. HCC-I at 1342 (citing *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975)).

62. HCC-I at 1343.

63. *Id.* (citing *Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring)).

64. HCC-I at 1345.

65. *Id.*

66. *Id.* at 1343-44 (citing *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981)). Second Circuit precedent supports the conclusion that an excludable alien in U.S. custody has a liberty interest in not being returned to conditions of persecution, even when relevant statutory provisions deny procedural rights to the alien. See *Azzouka v. Sava*, 777 F.2d 68, 74-5 (2d Cir. 1985); *Yiu Sing Chun v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983).

67. *Id.*

68. HCC-I at 1345.

69. 260 F.2d 610 (2d Cir. 1958).

President Eisenhower had a protected liberty interest entitling him to due process. The court's reliance on *Paktorovics* appears appropriate: if a Hungarian induced to come to the United States by official statements deserves due process of law, then surely a Haitian who is forcibly seized and indefinitely detained by U.S. officials warrants similar Fifth Amendment protection.

In sum, the Second Circuit found that United States control over the territory on which the Haitians were held and the Haitians' screened-in status entitled them to due process protections. In so holding, the court failed to consider plaintiffs' argument that the Fifth Amendment protects aliens who are confined by U.S. officials and prevented from challenging the conditions of their confinement.⁷⁰ Ten years ago, a federal court evaluated INS behavior that foreshadowed INS's operation at Guantánamo. The INS had detained, denied access to counsel to, and hastily repatriated thousands of Salvadorans.⁷¹ Finding an analogy between the Salvadorans' rights and those rights established in a series of prisoners' rights cases, the court concluded that detained aliens, like prisoners, are entitled to due process rights.⁷² The Salvadorans in *Orantes-Hernandez* and the Haitians in INS custody at Guantánamo were deprived of identical liberties: both groups were physically detained under armed guard, prevented from communicating with their attorneys or families, subjected to arbitrary discipline by guards, pressured to accept "voluntary departure," and left vulnerable to immediate and arbitrary repatriation to life-threatening circumstances.⁷³

III. THE DUTY OF NONREFOULEMENT

The core legal duty implicated in the second stage of *Haitian Centers Council v. McNary, HCC-II*, was that of *nonrefoulement*, or "nonreturn." Since 1981, the United States has been interdicting Haitians in international waters and, after cursory interviews concerning their possible asylum claims, destroying their boats and returning the vast majority to Haiti. On May 24, 1992, President Bush's Kennebunkport Order eliminated this minimal screening process and instructed the Coast Guard "[t]o stop and board [Haitian] vessels" in international

70. *HCC-I* at 1341 n.9.

71. *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982), *aff'd*, 919 F.2d 549 (9th Cir. 1990).

72. *Orantes-Hernandez*, 541 F. Supp. at 384 (citing *Bounds v. Smith*, 430 U.S. 817 (1977); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Rutherford v. Pitchess*, 457 F. Supp. 104, 115 (C.D. Cal. 1978), *rev'd on other grounds*, 468 U.S. 576 (1984)).

73. *Orantes-Hernandez*, 541 F. Supp. at 354. See *supra* note 24 for a description of the conditions at Guantánamo.

waters and "[t]o return the vessel[s] and [their] passengers to the country from which they came."⁷⁴

The principle of *nonrefoulement*—that a state may not return refugees to the hands of their persecutors—is one of the most fundamental tenets of international refugee law. Article 33(1) of the United Nations Convention Relating to the Status of Refugees, which has been incorporated into the Protocol, provides that "[n]o Contracting State shall expel or return" a refugee to a country where she may face persecution.⁷⁵ Section 243(h) of the INA,⁷⁶ which Congress expressly amended in 1980 to "bring United States refugee law into conformance with the 1967 United Nations Protocol,"⁷⁷ likewise prohibits the Attorney General from deporting or returning "any alien" to a country where she could face persecution.

Originally drafted by the United States and European nations in response to the desperate flight of millions of refugees during and after World War II, the 1951 Convention was intended to extend international protections to individuals who, having fled persecution in their own country, no longer could invoke that government's legal protection. According to the Convention's Preamble, the Convention sought "to assure refugees the widest possible exercise of [their] fundamental rights and freedoms."⁷⁸ *Nonrefoulement* was considered the most fundamental of these rights. Indeed, the drafters of the Convention considered *nonrefoulement* so important that originally they included no exceptions to the text of article 33(1).⁷⁹ Article 33 also is one of the few rights considered nonderogable—no state acceding to the Convention or Protocol may enter any reservation or further exception to article 33's provisions.⁸⁰ Over one hundred nations have acceded to either the Convention or the Protocol, and thus to the fundamental obligation of nonreturn. Some commentators now argue that the principle of *nonrefoulement*, like the prohibition against state-

74. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992), at § 2(c)(1), § 2(c)(3).

75. Convention Relating to the Status of Refugees, *supra* note 29, art. 33(1); Protocol Relating to the Status of Refugees, *supra* note 7, art. 1. Although the 1951 Convention established protections only for refugees in Europe following World War II, the 1967 Protocol incorporated articles 2 through 34 of the Convention and extended their protections to refugees around the globe.

76. 8 U.S.C. 1253(h) (1988).

77. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

78. Convention, *supra* note 29, Preamble.

79. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 72 (1983). Eventually, subsection 33(2) was added to the text, creating narrow exceptions to article 33(1) for individual refugees who have been convicted of a serious crime or who are considered a threat to a nation's security.

80. Convention, *supra* note 29, art. 42(1). Article 7(1) of the 1967 Protocol imposes the same limitation.

sponsored assassination and torture, has achieved the status of *jus cogens* and therefore binds nations regardless of any formal accession to it.⁸¹

Until recently, the United States has vigorously supported the principle of nonreturn. In 1989 and 1990, President Bush led the international community in denouncing Great Britain's policy of forcibly returning Vietnamese refugees from Hong Kong.⁸² Prior to the issuance of the Kennebunkport Order, every legal instrument governing the Haitian interdiction program mandated that the U.S. government strictly observe the principle of nonreturn of refugees.⁸³

Despite the United States' long-standing commitment to *nonrefoulement*, President Bush, on May 24, 1992, ordered the Coast Guard to intercept all fleeing Haitians and return them to Haiti without a screening. Although he acknowledged the United States' international legal obligations under the Protocol, the President justified his action on the ground that article 33's protections do not extend to refugees located outside the United States.⁸⁴

In *HCC-II*, the Second Circuit was directly confronted with the question whether either article 33 of the Convention or § 243(h) of the INA applies extraterritorially to forbid the return of refugees interdicted on the high seas.⁸⁵ The government asserted that neither provision was applicable, arguing that (1) the term "return" in article 33 and § 243(h) is a term of art applying only to the narrow concept of legal exclusion; (2) the signatory nations to the Convention and Protocol did not intend it to apply extraterritorially; and (3) principles

81. See Karen Parker & Lynn B. Neylon *Jus Cogens*, 12 HASTINGS INT'L & COMP. L. REV. 411, 435-36 (1989); Report of U.N. High Commissioner for Refugees, U.N. GAOR, 40th Sess., Supp. No. 12, at 6, U.N. Doc. A/40/12 (1985); Cartagena Declaration on Refugees, in *Annual Report of the Inter-American Commission on Human Rights 1984-85*, OEA/Fer.L/11.66, doc. 10, rev 1, at 190-93. According to Guy Goodwin-Gill, "[n]o state" in the modern era has claimed "the right to return a refugee, as such, to persecution." Guy S. Goodwin-Gill, *Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 291, 302 (1982).

82. See *U.S. Softens Its Stance on Return of the Boat People in Hong Kong*, N.Y. TIMES, Jan. 25, 1990, at A6. The U.S. issued this condemnation even though the British policy, unlike the present U.S. policy toward the Haitians, provided that all Vietnamese refugees would be interviewed to determine the substance of their asylum claims. Only those determined to be economic migrants, rather than political asylees, were candidates for forcible return to Vietnam.

83. See *supra* note 3.

84. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

85. Plaintiffs argued that establishing either provision as applying extraterritorially would be adequate for them to prevail. If § 243(h) were found to apply extraterritorially of its own force, it would bind the President's action. If article 33 were found both to apply extraterritorially and to be self-executing, it would independently bind the President. Even if the Protocol were not self-executing, however, it could bind the U.S. through § 243(h), because § 243(h) was explicitly intended to conform the INA to the Protocol. *INS v. Cardoza-Fonseca*, 480 U.S. at 436-37. The Second Circuit did not address the question of whether the Protocol was self-executing, but it found an extraterritorial mandate in both § 243(h) and article 33.

of comity rendered § 243(h) and article 33 presumptively *not* extra-territorial.⁸⁶ Rejecting each of these positions in turn, the Second Circuit found that the plain language of both § 243(h) and article 33 “forbids our country from laying hands on an alien anywhere in the world and forcibly returning him to a country in which he faces persecution.”⁸⁷

In reaching this holding, the court relied on the fundamental canon that judicial construction of a treaty or statute must begin with a provision’s plain language,⁸⁸ considered in light of the treaty or statute’s ordinary meaning and purpose.⁸⁹ Writing for the majority, Judge Pratt thus began by analyzing the plain language of both the Protocol and the INA. Article 33(1) of the Protocol provides that “[n]o Contracting State shall expel or return (*“refouler”*) a refugee in any manner whatsoever” to a country where she may face persecution.⁹⁰ Section 243(h)(1) of the INA, entitled “Withholding of Deportation or Return,” states that the Attorney General “shall not deport or return any alien” to a country where her life or freedom would be threatened.⁹¹ Judge Pratt observed that neither clause limits the location “from” which a refugee’s return is barred.⁹² “[W]hat is important,” he stressed, “is where the refugee is to be returned to.”⁹³

Judge Pratt next examined two issues: whether the term “any alien” in § 243(h) (and “refugee” in article 33) includes Haitians on the high seas, and whether U.S. interdiction policy falls within the meaning of the term “return” in both provisions.⁹⁴ Answering the first question, the court found that the INA explicitly defines an “alien” as “any person not a citizen or national of the United States,”⁹⁵ and that the 1951 Convention defines a refugee as “any person who . . . owing to

86. Other arguments raised by the government include claims that (1) additional language in § 243(h)(2) indicates that the provision applies only domestically; (2) the historical placement of § 243(h) in section V of the INA, which concerns deportation, precludes its extraterritorial application; and (3) § 243(h)’s prohibition against forcible return applies only to the Attorney General and not to actions by the President or other subordinates. *HCC-II*, 969 F.2d at 1358–60.

87. *HCC-II* at 1369 (Walker, J., dissenting). In reaching this decision, the court openly disagreed with the Eleventh Circuit’s conclusion in *HRC v. Baker*, 950 F.2d 685 (11th Cir.1991), that § 243(h) of the INA does not apply extraterritorially. *HCC-II* at 1357.

88. *HCC-II* at 1360 (citing *Moskal v. United States*, 498 U.S. 103 (1990) (1990)).

89. *HCC-II* at 1361–62 (citing Vienna Convention on the Law of Treaties, concluded May 23, 1969, art. 31(1), 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)).

90. Protocol Relating to the Status of Refugees, *supra* note 7, art. 1.

91. 8 U.S.C. § 1253(h)(1) (1988).

92. *HCC-II* at 1361. Rather, both clauses focus exclusively on the *object* of the prohibited government action (“any alien” in § 243(h); “a refugee” in art. 33), the *nature* of the act (“The Attorney General shall not *deport or return*” in § 243(h); no state shall “*expel or return*” in art. 33), and the act’s *destination* (the country of persecution).

93. *HCC-II* at 1361 (discussing § 243(h)); *HCC-II* at 1362 (discussing art. 33).

94. *HCC-II* at 1358 (discussing § 243(h)); *HCC-II* at 1362 (discussing art. 33).

95. *HCC-II* at 1358 (citing INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1990)).

a well-founded fear of being persecuted . . . is outside the country of his nationality.”⁹⁶ Haitians fleeing persecution who are seized on the high seas, the court concluded, fall squarely into these definitions of “any alien” and “refugee.”⁹⁷

The government had invited the Second Circuit to find that “deport or return” in § 243(h) referred exclusively to deportation and exclusion, two legal forms of expelling individuals who are physically present in the United States.⁹⁸ According to this interpretation, § 243(h) only prevents the Attorney General from forcibly returning refugees who have reached the borders of or actually entered the United States.⁹⁹ The court rejected the government’s argument, holding that, within the meaning of the INA, “‘return’ means ‘return.’”¹⁰⁰ Thus, the court concluded, the Kennebunkport Order’s directive that the Coast Guard “return the vessel and its passengers to the country from which it came” commands “exactly the kind of ‘return’ that is prohibited by § 243(h)(1).”¹⁰¹

The court bolstered its plain language analysis with an examination of the 1980 amendments to § 243(h). Prior to the 1980 amendments, § 243(h) stated that the Attorney General “is authorized to withhold deportation of *any alien within the United States*” (emphasis added) when that alien would face persecution in her home country. The 1980 amendments made “withholding of deportation” mandatory and expanded § 243(h) to apply to “return” as well as to deportation. Furthermore, Congress excised the words “within the United States,” thereby broadening the statute to apply to “any alien.” In these amendments, the Second Circuit found evidence that the “return” of “any alien” included the repatriation of aliens seized outside U.S. territory. The Second Circuit rejected the government’s formalistic argument that Congress removed the words “within the United States” to broaden the statute’s reach only to include excludable aliens.

The court next considered the government’s claim that the drafters of the 1951 Convention intended article 33 to protect only refugees within the borders of the signatory states. Because § 243(h) was intended to incorporate the treaty, the government argued, a domestic

96. HCC-II at 1362.

97. HCC-II at 1358.

98. Brief of the United States at 55, HCC-II. Within the meaning of the INA, “deportation” refers to the expulsion of aliens who have entered the U.S. “Exclusion” applies to aliens who have reached U.S. borders but who are not considered to have effected an entry.

99. Brief of the United States at 52.

100. HCC-II at 1362. The government likewise argued that the term “*refouler*” in article 33 referred to the narrow concept of expulsion from a country. The Second Circuit rejected this argument as well, reasoning that the government’s translation of “*refouler*” would render article 33 redundant: “Article 33.1 would forbid a state to ‘expel or expel’ an alien.” *Id.* at 1363.

101. HCC-II at 1361.

limitation on the applicability of the treaty would thereby also limit the scope of § 243(h). The government supported this position, not with the plain language of the treaty, but with the following comment from the 1951 Convention's negotiating history (*travaux préparatoires*):

Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country whereas the word "return" ("*refoulement*") related to a refugee already within the territory but not yet resident there. According to that interpretation, article 33 would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations.

In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.

There being no objection, the PRESIDENT [of the Conference] *ruled* that the interpretation given by the Netherlands representative should be placed on the record.¹⁰²

As the Second Circuit observed, the Vienna Convention on the Law of Treaties instructs courts to construe treaties based primarily on their language and purpose, not their negotiating history.¹⁰³ Furthermore, as the U.N. High Commissioner for Refugees informed the court, as *amicus curiae* to the Haitian plaintiffs:

Delegates to the drafting sessions were permitted to have their opinions placed on the record of the meetings in order to preserve their views at the time of that meeting. However, such comments did not serve as the final official interpretation

102. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty-Fifth Meeting, U.N. Doc. A/Conf.2/SR.35, at 21 (July 25, 1951).

As judicial support for this interpretation of the negotiating history, the government relied on Judge Edwards' concurrence in *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 839 (D.C. Cir. 1987), where the majority dismissed a challenge to interdiction procedures for lack of standing. Adopting the government's position, Judge Edwards found that "Article 33 in and of itself provides no rights to aliens outside a host country's borders." *Id.* at 840.

103. HCC-II at 1362 (citing Vienna Convention on the Law of Treaties, art. 32, *supra* note 89).

of the treaty, nor did they bind the delegate or his government.¹⁰⁴

Indeed, only four other nations of the twenty-six states represented at the drafting session vocally assented to the interpretation of the Swiss and Dutch delegates. Notably, the United States was not among the four acceding nations.

Furthermore, as the Second Circuit noted, even taking the negotiating history at face value hardly compels the government's conclusion.¹⁰⁵ The drafters of the 1951 Convention sought to create broad protections for Europe's new populations of refugees. They were also concerned, however, that nothing in the treaty should be interpreted to *require* that any nation grant asylum to any refugee.¹⁰⁶ The millions of refugees displaced during World War II imposed tremendous pressures on many small European nations. Countries such as Switzerland and the Netherlands thus were particularly concerned that the duty not to *return* refugees should not be construed as requiring states to grant formal *admission* to these aliens.¹⁰⁷

The government also invoked the "presumption against extraterritoriality" to support its claim that § 243(h) only applies domestically. Under this doctrine, courts must presume that Congress will not silently extend its laws to contexts where they could conflict with the

104. Brief of *Amicus Curiae* Office of the United Nations High Commissioner for Refugees at 16 n.24. The Second Circuit agreed that no clear implication can be drawn from the mere act of "placing" the delegate's interpretation on the record. *HCC-II* at 1365.

105. *HCC-II* at 1366.

106. GOODWIN-GILL, *supra* note 79, at 74.

107. *HCC-II* at 1366. See GOODWIN-GILL, *supra* note 79, at 74 ("non-refoulement in the sense of even a limited obligation to allow entry may well have been seen as coming too close to the unwished-for duty to grant asylum"). This interpretation is corroborated by the position taken by the U.S.'s own representative at the 1950 negotiating conference, Professor Louis Henkin. In his affidavit to the Supreme Court during the appeal of the Second Circuit's decision, Professor Henkin notes that "[t]hose who drafted the Convention recognized that governments were not prepared to commit themselves to grant asylum, even to *bona fide* refugees." Affidavit of Louis Henkin, Appendix A to Brief of Respondents, *McNary v. Haitian Centers Council, Inc.*, Sup. Ct. No. 92-344 (Oct. Term 1992). Furthermore, Henkin explained, "by expressing a caveat about mass migrations, the delegates were confirming that the right of *non-refoulement* attached to individual refugees and not to groups. They were not limiting the territorial reach of Article 33." *Id.* Indeed, at the negotiating conference, Henkin had cautioned the delegates:

Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, . . . the problem was more or less the same . . . [H]e must not be turned back to a country where his life or freedom could be threatened.

Id. (quoting *Summary Record of the Twentieth Meeting of the Ad Hoc Committee on Statelessness and Related Problems*, Feb. 1, 1950, U.N. Doc. E/AC.32/SR.20.). "[T]his statement," Henkin noted, "was the official position of the United States government with regard to the meaning of Article 33." *Id.* It is well accepted that the U.S.'s interpretation of a treaty, at the time the treaty is drafted and adopted, controls later legal interpretations of the instrument. See Harold H. Koh, *The President Versus the Senate in Treaty Interpretation: What's All the Fuss About?*, 15 YALE J. INT'L L. 331, 339 (1990).

laws of neighboring states.¹⁰⁸ As the Second Circuit held, however, the presumption against extraterritoriality applies only where congressional intent is "*unexpressed*" or ambiguous.¹⁰⁹ Furthermore, the court found the government's comity concerns irrelevant in the Haitian interdiction context, where the challenged actions take place in international, nonsovereign waters.¹¹⁰

In sum, by focusing on the absolute and universal mandate against forced return embodied in both article 33 and § 243(h), the Second Circuit dispelled the government's numerous arguments regarding extraterritoriality. In so doing, however, the court failed expressly to address the most compelling argument for applying the principle of nonreturn to the Haitian interdiction program. In elevating the principle of *nonrefoulement* to the core international protection for asylum seekers, the Convention signatories sought to forestall tragedies such as that of the *St. Louis*, a vessel laden with Jews which the United States turned away from New York harbor during World War II, only to return its passengers to Nazi Germany's gas chambers.¹¹¹ Judge Hatchett addressed this concern while dissenting in *HRC v. Baker*:

Jewish refugees seeking to escape the horror of Nazi Germany sat on ships in New York Harbor, only to be rebuffed and returned to Nazi Germany gas chambers. Does anyone seriously contend that the United States's responsibility [under the Protocol] for the consequences of its inaction would have been any less if the United States had stopped the refugee ships *before* they reached our territorial waters? . . . Such a contention makes a sham of our international treaty obligations and domestic laws for the protection of refugees.¹¹²

If the obligation of *nonrefoulement* were to apply only when a government acts within its own borders, as the United States has argued, then today, were history to repeat itself, the United States could lawfully hunt down approaching Jewish refugees on the high seas *in order* to return them to their Nazi persecutors. Nothing in article 33 or § 243(h) sanctions such an outrageous result.

108. See *EEOC v. Arab American Oil Co.*, 111 S. Ct. 1227, 1230 (1991), cited in *HCC-II* at 1358 (the presumption against extraterritoriality "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord.").

109. *HCC-II* at 1358 (citing *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

110. *HCC-II* at 1358. Additionally, the court noted that the traditional comity concern of forum-shopping by foreign citizens is also absent, because only when the U.S. affirmatively reaches outside its borders to extend authority over refugees can the "§ 243(h)(1) ban . . . be invoked by persons located outside the borders of the U.S." *Id.* at 1358-59.

111. Henkin Affidavit, *supra* note 107, ¶ 6. See also GORDON THOMAS & MAX MORGAN WITTS, *VOYAGE OF THE DAMNED* (1974).

112. 949 F.2d 1109, 1112 (11th Cir. 1991) (Hatchett, J., dissenting).

IV. JUDICIAL REVIEW OF THE HAITIAN INTERDICTION POLICY AND CONGRESS'S PLENARY POWER OVER IMMIGRATION

The U.S. government's defense of the Kennebunkport Order in *HCC-II* did not stop at a discussion of the INA and the Protocol. The government also argued that adjudication of the merits of the plaintiffs' claim under the Administrative Procedure Act ("APA")¹¹³ was barred and that the Constitution vests the executive with inherent authority to institute the policy of forced repatriation. Rejecting both of these contentions, the Second Circuit reviewed the *HCC-II* plaintiffs' claims and held on the merits that the Constitution does not grant the executive authority to issue the Kennebunkport Order in the face of § 243(h)'s prohibition against returning refugees.

A. *Reviewability of the Interdiction Program Under the APA*

In ruling that § 243(h) prohibits the government from summarily repatriating all Haitians interdicted at sea, the Second Circuit implicitly recognized that it was authorized to review the interdiction policy. The Second Circuit opinion in *HCC-II*, however, does not expressly identify the source and nature of the Haitian plaintiffs' cause of action. Given that the threshold requirements for review under the APA were satisfied in *HCC-II* and that the Haitian plaintiffs' claim did not fall within any of the APA's statutory exceptions, the Second Circuit's opinion may be understood as implicitly granting the plaintiffs a right to review under the APA.¹¹⁴

1. Threshold Requirements for APA Review

The APA establishes procedures for the judicial review of actions taken by the federal government, conferring on "person[s] . . . adversely affected or aggrieved by [final] agency action" a cause of action for declaratory and injunctive relief against executive branch officials.¹¹⁵ Reviewing courts are instructed to invalidate agency action that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise

113. 5 U.S.C. §§ 701-706 (1988).

114. Unlike the Second Circuit in *HCC-II*, the Eleventh Circuit in *HRC v. Baker* explicitly addressed the question of the reviewability of the government's interdiction policy under the APA and accepted the government's argument, discussed *infra* text accompanying notes 125-130, that the INA precluded APA review of HRC's challenge to the refugee screening procedures then in place. 953 F.2d 1498, 1505-09 (11th Cir. 1991). Oddly, however, the *Baker* court then went on to decide the merits of the plaintiffs' claim. *Id.* at 1509-10. Thus, the opinion's conclusions regarding APA reviewability were not only unnecessary to its ruling, but logically inconsistent with it.

115. 5 U.S.C. § 702 (1988).

not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; [or] (C) in excess of statutory jurisdiction, authorization, or limitations, or short of statutory rights"¹¹⁶ Even where a federal law—be it a statute, treaty, or executive order—confers no private right to sue, the APA authorizes courts to determine whether a challenged agency action violates the law in question.¹¹⁷

All of the statutory prerequisites for APA review were satisfied in *HCC-II*. The Coast Guard and the INS, the federal agencies that enforce the interdiction policy, both qualify as "agenc[ies]" as defined by the APA, and their implementation of the policy plainly constitutes "final agency action."¹¹⁸ The fact that the plaintiffs are nonresident aliens located outside of the territorial United States poses no bar to APA review, as courts have held that aliens abroad are "person[s]" as defined by the APA, and thus entitled to sue.¹¹⁹ Furthermore, the APA imposes no geographic limitations on the categories of government action for which it authorizes review. When the federal government acts outside of the territorial United States, courts have held that APA review is available as long as other statutory prerequisites are satisfied.¹²⁰

2. Exceptions to APA Review

The government argued that because the decision to institute the Haitian interdiction policy had been made by the President and for-

116. 5 U.S.C. § 706(2) (1988).

117. See, e.g., *Sierra Club v. Hodel*, 848 F.2d 1068, 1076 (10th Cir. 1988) (statute); *Cardenas v. Smith*, 733 F.2d 909, 917–19 (D.C. Cir. 1984) (treaty); *Legal Aid Society v. Brennan*, 608 F.2d 1319, 1331–32 (9th Cir. 1979), cert. denied 447 U.S. 921 (1980) (executive order).

118. 5 U.S.C. § 704 (1988). The Supreme Court has stated: "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2773 (1992). Once enforced, the Kennebunkport Order met these prerequisites and thus constituted "final agency action."

119. See *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1191–92 (D.C. Cir. 1972). See also *DKT Memorial Fund Ltd. v. A.I.D.*, 691 F. Supp. 394, 400 (D.D.C. 1988) ("the Court finds [foreign plaintiffs] have standing to assert their claims under the . . . APA"), *aff'd in pertinent part*, 887 F.2d 275, 281–82 (D.C. Cir. 1989); *Saipan v. United States Dep't of Interior*, 356 F. Supp. 645, 653 (D. Haw. 1973) ("this court will not deny plaintiffs standing in this suit because of their status as nonresident aliens where no such congressional intent is manifested in . . . the APA"), *aff'd as modified*, 502 F.2d 90 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975).

120. See, e.g., *Overseas Media Corp. v. McNamara*, 385 F.2d 308 (D.C. Cir. 1967). The Supreme Court has recently announced that, absent evidence of congressional intent to the contrary, federal statutes generally will be presumed not to apply extraterritorially. *EEOC v. Arab American Oil Co.*, 111 S. Ct. 1227, 1230 (1991). However, the *Arab American* presumption "serves to protect against unintended clashes between [U.S.] laws and those of other nations." *Id.* "[W]here there is no potential for conflict 'between our laws and those of other nations,' the purpose behind the presumption is eviscerated" *Environmental Defense Fund v. Massey*, No. 91-5278, 1993 U.S. App. LEXIS 1380, at 18 (D.C. Cir. Jan. 29, 1993) (quoting *Arab American*, 111 S. Ct. at 1230). Thus, on the high seas and in territories subject to exclusive U.S. jurisdiction such as Guantánamo, the presumption against extraterritoriality has little relevance.

malized through an executive order, it was exempt from APA review.¹²¹ The Second Circuit properly declined to accept this argument. Courts have recognized only two categories of presidential action as immune from APA review: administration of the President's personal office and immediate staff,¹²² and discretionary functions carried out directly by the President pursuant to statutory delegations of authority.¹²³ *HCC-II* concerned neither of these types of presidential decisions but instead challenged the legality of acts carried out by the INS and the Coast Guard—two APA agencies. Policies ordered by the President but implemented by other federal agencies are routinely reviewed under the APA.¹²⁴ Indeed, if the APA were interpreted as insulating from review actions taken by federal agencies under presidential directive, many of the most important agency actions would be rendered unreviewable. No court has ever sanctioned such an evisceration of the federal administrative law system.

The government advanced a second ground for finding the interdiction policy unreviewable, arguing that in enacting certain provisions of the INA, Congress intended to override the APA and bar refugees located outside of the United States from having recourse to APA review. Section 701(a)(1) of the APA excludes from review claims involving statutes that have been construed as intended to "preclude judicial review."¹²⁵ However, it is a settled principle of administrative law that APA § 702¹²⁶ creates a strong presumption in favor of judicial review for all final agency action.¹²⁷ The government argued that this presumption was overcome by Congress's intent, evidenced in the INA's structure, to preclude review of U.S. actions toward refugees outside of the territorial United States.¹²⁸ The government noted that § 106 of the INA¹²⁹ establishes specialized procedures by which aliens located in the United States may obtain administrative and judicial review of INS decisions concerning their applications for asylum or withholding of deportation. Section 207 of the INA¹³⁰ authorizes the

121. Brief of the United States at 61, *HCC-II*.

122. See *Armstrong v. Bush*, 924 F.2d 282, 288–89 (D.C. Cir. 1991), cited in Brief of the United States at 61, *HCC-II*.

123. See *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2775–76 (1992).

124. See, e.g., *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986); *EEOC v. CBS, Inc.*, 743 F.2d 969 (2nd Cir. 1984); *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984); *Muller Optical Co. v. EEOC*, 743 F.2d 380 (6th Cir. 1984); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

125. 5 U.S.C. § 701(a)(1) (1988).

126. 5 U.S.C. § 702 (1988).

127. See *McNary v. Haitian Refugee Ctr.*, 111 S. Ct. 888 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). See also *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986).

128. Brief of the United States at 59–61, *HCC-II*.

129. 8 U.S.C. § 1105a (1988).

130. 8 U.S.C. § 1157 (1988).

government to grant refuge to aliens located overseas but makes no provision for judicial review of decisions concerning these aliens. The government reasoned that because Congress created the § 106 review provision and failed specifically to authorize review of decisions concerning overseas refugees applying for admission under § 207, Congress intended to bar review of the legality of *any* government action concerning refugees outside of the United States.

The government's reasoning contains numerous flaws, which explains why the Second Circuit remained unpersuaded by it. First, courts regularly review many types of immigration decisions, even when the INA does not specifically authorize review.¹³¹ Second, the Supreme Court has specifically admonished courts against inferring from statutory silence an intent to preclude judicial review.¹³² Third, even where special INA provisions limit or channel the reviewability of *individual* INS decisions in certain fields, those special provisions have been held not to preclude APA review of "general collateral challenges to practices and policies used by the agency in [making such individual decisions]." ¹³³ Thus, even if the INA were found to bar review of individual INS refugee screening decisions made outside U.S. territory, § 106 would not preclude review of the government's general policy of wholesale forced repatriation. Lastly, as the government itself stressed repeatedly, the plaintiffs in *HCC-II* did not claim a right to asylum or withholding of deportation. Their challenge was not to government decisions denying them *entry* to the United States but to the policy of forced *return* to their country of persecution. Thus, regardless of what inference one draws from the structural relationship between § 106 and § 207 concerning the reviewability of decisions regarding the admission of overseas refugees, these provisions have no bearing on the reviewability of a government policy of *refoulement*.

B. Congress's Plenary Power over Immigration

In *HCC-II*, the government contended that even if the Haitian plaintiffs did enjoy a right to APA review and even if the INA barred

131. According to the leading immigration treatise, almost every category of immigration determination is subject to at least limited judicial review. CHARLES GORDON & STANLEY MAILMAN, *IMMIGRATION LAW & PROCEDURE* § 81.11[4], at 81-186 to 81-192 (1992).

132. *Morris v. Gressette*, 432 U.S. 491, 506 n.22 (1977) ("The existence of an express preclusion of judicial review in one section of a statute . . . is not conclusive with respect to reviewability under other sections of the statute."); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) ("The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.").

133. *McNary v. Haitian Refugee Ctr.*, 111 S. Ct. 888, 896 (1991) (emphasis supplied). Lower courts have also regularly acknowledged the judicial reviewability of general policies, practices, or procedures affecting the rights of aliens, including the right to apply for asylum. *See, e.g., Morales v. Yeutter*, 952 F.2d 954 (7th Cir. 1991); *Montes v. Thornburgh*, 919 F.2d 531 (9th Cir. 1990); *ILGWU v. Meese*, 891 F.2d 1374 (9th Cir. 1989).

the executive from returning refugees interdicted at sea, the Constitution precluded the courts from enforcing § 243(h) of the INA against the Coast Guard and INS.¹³⁴ The government argued that the Constitution vests the President with inherent authority to interdict and return refugees on the high seas, even in the face of an express congressional prohibition.¹³⁵ The Second Circuit rejected the government's contention, concluding that none of the President's constitutional powers entitle him to ignore § 243(h)'s prohibition against *nonrefoulement*.

The court analyzed the government's claim within the framework laid out by Justice Robert Jackson in his celebrated concurring opinion in *Youngstown Sheet & Tube v. Sawyer*.¹³⁶ In Jackson's view, the legitimacy of executive authority is a function of both the Constitution's allocation of powers and the degree to which Congress has endorsed the act in question.¹³⁷ When the President acts contrary to the will of Congress, "his power is at its lowest ebb,"¹³⁸ and he may act only pursuant to his independent constitutional powers.¹³⁹

After finding that the Kennebunkport Order violated Congress's will as expressed in § 243(h),¹⁴⁰ the Second Circuit considered whether

134. Responding to what it termed an "undercurrent in the government's brief," the *HCC-II* court also addressed *sua sponte* the question of whether the interdiction program presented a nonjusticiable political question. *HCC-II*, 969 F.2d at 1367. Agreeing with the other federal courts that have ruled in Haitian refugee lawsuits, the court held that "The federal courts may review a case such as this one to insure that 'the executive departments abide by the legislatively mandated procedures.'" *Id.* (quoting *HRC v. Gracey*, 809 F.2d 794, 838 n.116 (D.C. Cir. 1987) (Edwards, J., concurring)). See *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992) (adjudicating on the merits the challenge to Haitian interdiction policy).

135. Brief of the United States at 27-30, *HCC-II*.

136. 343 U.S. 579, 634-60 (1952) (Jackson, J., concurring). In *Youngstown*, the Supreme Court considered President Truman's attempt to invoke his Commander-in-Chief powers to seize and operate the nation's steel mills so as to prevent an anticipated industry-wide strike from interrupting the flow of steel to the nation's armaments industry during the Korean War. Although Justice Jackson's *Youngstown* opinion was not a majority opinion, the Supreme Court "has now embraced Jackson's concurring opinion as the lodestar of its separation-of-powers jurisprudence." HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 105 (1990). See *id.* at 278 n.18 (gathering cases).

137. As Justice Jackson explained:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which distribution is uncertain When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Youngstown, 343 U.S. at 635-37. See generally KOH, *supra* note 136, at 107-08.

138. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in HCC-II*, 969 F.2d at 1366.

139. See KOH, *supra* note 136, at 109 (citing diplomatic recognition of foreign governments as one of the few such executive powers).

140. The *HCC-II* court dismissed out of hand government attempts to glean congressional

the President's action might nonetheless be sustained by virtue of some inherent independent constitutional authority. Noting that the Supreme Court has construed the Constitution as granting Congress "'complete,' 'plenary' legislative power over immigration matters,"¹⁴¹ and concluding that forced repatriation is a matter of immigration policy, the court held that the President may not defy the § 243(h) mandate against *refoulement*.¹⁴² The government attempted to distinguish this body of Supreme Court precedent by invoking a now widely criticized Cold War era case, *Knauff v. Shaughnessy*,¹⁴³ which, in dictum, speaks of inherent executive authority to exclude aliens from the United States.¹⁴⁴ Responding to the government's argument, the Second Circuit in *HCC-II* found that even if inherent executive authority

authorization for the Kennebunkport Order from INA §§ 212(f) and 215(a)(1), 8 U.S.C. §§ 1182(f), 1185(a)(1) (1988). Section 215(a)(1) authorizes the President to regulate the entry of aliens into the U.S., and § 212(f) empowers him to "suspend the entry of all aliens or any class of aliens" when he finds that circumstances so warrant. First, the court noted that the executive's power to control entry does not authorize the policy of forced return. *HCC-II*, 969 F.2d at 1366. Second, the court stressed that these statutory delegations of general authority are necessarily subject to and limited by § 243(h)'s express injunction against the forced return of refugees: "[W]e can hardly infer Congress's permission for the executive to do what it expressly forbade him from doing by § 243(h)(1) of the INA." *HCC-II*, at 1367. This conclusion is supported by the canon of statutory construction which disfavors construing a general statutory authorization as undercutting an express prohibition. See *California Save Our Streams Council v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989).

141. The Constitution grants to Congress the power "[t]o establish a uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. The Court has interpreted this clause as giving Congress "complete" power over immigration. *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) ("over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens"). See also *Kliendienst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Oceanic Navigation*); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("that the formulation of [immigration policy] is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government"). See generally Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 6 (1984); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

The government cited three cases for the premise that the Executive enjoys an inherent power to regulate immigration: *Kliendienst v. Mandel*, 408 U.S. 753 (1972); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); and *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), cited in Brief of the United States at 54, 69, *HCC-II*. However, each of these cases involved a challenge to an executive branch action taken pursuant to a statutory delegation of immigration authority. In each, the Court rejected claims that provisions of the Bill of Rights barred the Executive and Congress from taking the challenged action. Because the Court sustained the challenged actions as statutorily authorized, and upheld the authorizing statutes as constitutionally sound, the question of "inherent" presidential power was not presented in these cases. Although *Knauff* does contain language concerning an inherent executive power to exclude aliens at the border, that discussion is dictum. See *infra* text accompanying notes 143-146.

142. *HCC-II*, 969 F.2d at 1367.

143. 338 U.S. 537 (1950).

144. *Id.* at 542, cited in Brief of the United States at 54, *HCC-II*. For a discussion of *Knauff* and the disfavor with which it is now viewed by scholars and observers, see Louis Henkin, *The President and International Law*, 80 AM. J. INT'L. L. 930, 937 n.20 (1986); David Moyce, Comment, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CAL. L. REV. 1747, 1747 n.6 (1986) (gathering sources criticizing *Knauff*).

to exclude aliens exists, it would not be sufficient to sustain the Kennebunkport Order. Reaching out beyond U.S. borders to interdict and repatriate Haitians on the high seas, the court noted, goes well beyond the simple policing of U.S. borders. Even if it is true that the President possesses inherent constitutional authority "to turn back from our gates any alien or class of alien,"¹⁴⁵ the court held that such a power does not authorize the interdiction and summary return of aliens who are "far from, and by no means necessarily heading for, our gates."¹⁴⁶

The government also invoked the President's power as Commander-in-Chief of the armed forces¹⁴⁷ and his "inherent authority as 'the sole organ of the nation in its external relations'"¹⁴⁸ as sources of authority for the Kennebunkport Order. The Second Circuit rejected these arguments and, citing *Youngstown*, held that the policy dispute at issue "is a job for the Nation's lawmakers, not for its military authorities."¹⁴⁹ This conclusion reflects a recognition that the Constitution's system of checks and balances would be dramatically compromised if the vast array of policy questions that implicate national security were deemed the sole province of the Commander-in-Chief.¹⁵⁰ The court further held that the question of refugee interdiction and return is by nature a matter of immigration policy, not of "the country's external relations," and is therefore properly the subject of congressional regulation.¹⁵¹

145. *HCC-II*, 969 F.2d at 1366 (quoting *Knauff*, 388 U.S. at 550 (Jackson, J., dissenting)).

146. *Id.* While recognizing that "the executive's actions have the practical effect of prohibiting some Haitians' entry into the United States," the court stressed that "they also have the effect of prohibiting the Haitians from gaining entry into the Bahamas, Jamaica, Cuba, Mexico, the Cayman Islands, or any other country in which they might seek safe haven." *Id.* It has never been established how many of the interdicted Haitians were headed for the U.S. The Justice Department's own Office of Legal Counsel stated in 1981 that "experience suggests that" only "two-thirds of the [Haitian] vessels are headed toward the United States." Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242, 242-43 (1981).

147. U.S. CONST. art. II, § 2.

148. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), quoted in Brief of the United States at 27, *HCC-II*.

149. *HCC-II*, 969 F.2d at 1367, quoting *Youngstown*, 343 U.S. at 587.

150. As Justice Jackson admonished, "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring).

151. *HCC-II*, 969 F.2d at 1367. Even if the court had concluded that the interdiction policy could properly be deemed a matter of foreign policy, it should still have reached the same result. Contrary to executive protestations, the foreign affairs power is one that the Constitution vests jointly in the legislative and executive branches. See generally KOH, *supra* note 136, at 105-13; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 219-25 (2d ed. 1988). When Congress legislates in this zone of shared authority, courts may enforce statutory policy pronouncements against the executive branch. See *Youngstown*, 343 U.S. 579 (1952); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). Indeed, few would question that Congress could bind the executive branch if, invoking its appropriations power, U.S. CONST. art. I, § 9, cl.7, it reworded § 243(h) to expressly forbid the INS and the

V. CONCLUSION

The Second Circuit's decision in *Haitian Centers Council v. McNary* broke new ground in important areas of immigration and constitutional law. It produced valuable precedent concerning the due process rights of aliens abroad, the extraterritorial application of the INA, and the proper relationship between the legislative, executive, and judicial branches in crafting and reviewing U.S. policy towards aliens. The Second Circuit's decision, however, has not assisted Haitians in obtaining safe haven from their persecutors. As this Article goes to press, over 250 Haitians languish in an internment camp on Guantánamo, and the Clinton Administration continues to interdict and repatriate fleeing Haitians without first screening them. Those wishing to escape persecution in Haiti live on the hopes either that President Aristide will be restored to power or that the U.S. policy of forced repatriation will be recognized by the United States Supreme Court as violating the principle of *nonrefoulement*—the most basic tenet of domestic and international refugee law.

Coast Guard from using appropriated funds to return refugees. See Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1350–51 & nn.31–32; 1360–63; 1386–87 & n.213 (1988) (except with respect to functions that the Constitution expressly empowers the executive to perform, Congress may make policy by proscribing the use of appropriated funds for particular activities). Although the Congresses that enacted and amended § 243(h) did not invoke their spending power, the enforceability of appropriations-based limitations demonstrates that the share of foreign affairs authority residing solely in the executive cannot be sufficient to sustain the enforcement of the interdiction policy in the face of Congress's § 243(h) prohibition.